82 NO. 2025

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In The

Supreme Court of the United States

October Term, 1982

CHAVIS TEAL,

Petitioner,

vs.

MORRISON - KNUDSEN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Can the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973) standard for proving a wrongful discharge be met where the record is unclear that the discharged minority member is replaced by a white employee?

2. Can the *McDonnell Douglas Corp. v. Green, supra,* test be used to deny a *prima facie* case where the displaced employee presents evidence that has created a factual issue on (1) the question of pretext, and (2) the veracity of the reasons asserted by the employer for discharging employee?

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No.

In The

Supreme Court of the United States

October Term, 1982

CHAVIS TEAL,

Petitioner,

vs.

MORRISON — KNUDSEN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The decision of the Court of Appeals, without opinion, included in the petitioner's appendix, *infra* at 3a, Civil Action No. 82-1028, is an unpublished decision. The opinion and judgment of the Court of Appeals denying summary affirmance is also an unpublished decision (5a). The opinion of the District Court, Civil Action No. 81-757 is also unreported (7a).

JURISDICTION

The judgment of the Court of Appeals (3a) was entered on November 2, 1982; the petition for rehearing was denied on December 14, 1982 (1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race . . . .

STATEMENT OF THE CASE

A. Statement of the Facts

Chavis Teal began his employment with Morrison-Knudsen on December 23, 1975, as a locomotive operator, and continued his employment until his discharge on March 26, 1976.[1] The respondent was responsible for the construction of two portions of the Washington Area Metropolitan subway system. The petitioner held the same position throughout his employment tenure during which time he worked under the supervision of Master Mechanic Edward T. Marschik (white). Petitioner began

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1. The period in question was interrupted by a lay-off (due to a reduction in force) from January 28, 1976 to February 6, 1976.

work on the portal operation, which is the excavation of the entranceway to the subway system. Mr. Marschik reassigned petitioner to work on the "mole" operation, which entailed the removal of dirt and other materials from the subterranean excavation in early February 1976.

Petitioner was transferred in early March 1976, to work on the portal operation. Prior to the period predating the transfer of petitioner in March 1976, there was no evidence presented in petitioner's work record that he was not performing his job in a satisfactory manner. Petitioner contends that his transfer to the portal operation was discriminatory since the duration of the mole contract was eighteen months longer than at the portal operation, thus providing longer employment, and he was replaced by a white male.

The respondent alleges that Mr. Marschik received complaints from other employees that petitioner failed to respond to signals of the brakeman on his crew, thereby creating a safety hazard. Petitioner denies any such negligence on his part. On March 26, 1976, Mr. Marschik was directed to terminate petitioner by the assistant equipment superintendent, based upon a note allegedly complaining of an incident from petitioner's co-workers on the same date, concerning unsafe operation of the locomotive petitioner was allegedly assigned to drive. However, it remains uncontested that petitioner was on leave to attend court on the day in question.

Petitioner disputed the assertion that his job performance was substandard, and he filed a charge of discrimination with the D.C. Office of Human Rights on April 26, 1976, and subsequently with the Equal Employment Opportunity Commission (EEOC). When the EEOC failed to issue a decision within 180 days, petitioner brought the instant action in 1981, alleging discriminatory discharge. The District Court properly

exercised jurisdiction over this matter pursuant to 42 U.S.C. §2000e-5(f)(3).

B. The Proceeding Below

Shortly after the instant action was filed, respondent moved for dismissal by way of a motion for summary judgment, maintaining that there were no genuine issues of material fact in question. Petitioner opposed the motion alleging facts to support his burden of establishing a *prima facie* case of discrimination.

The District Court granted summary judgment in favor of respondent pursuant to F.R. Civ. P. 56, on the ground that there was no genuine issue of material fact as to whether the petitioner could establish a *prima facie* case of discrimination, or establish that respondent's stated reason for its employment decision was a pretext for prohibited discriminatory practices.

In June 1981, the Court of Appeals for the District of Columbia Circuit, denied respondent's motion for summary affirmance, stating in part that petitioner had created a factual issue on the question of pretext, and the veracity of respondent's asserted reason for discharging petitioner precluded summary judgment and hence summary affirmance.

However, on November 2, 1982, the Court of Appeals affirmed the District Court's grant of summary judgment, without an opinion.

REASONS FOR GRANTING THE WRIT

I.

The decision of the District Court for the District of Columbia below is in conflict with decisions of this Court.

The decision of the District Court should be reviewed by this Court because it conflicts with established guidelines of controlling cases decided by this Court. The decision too stringently applies the standards necessary to establish a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964, as amended. In particular, the decision below conflicts with guidelines established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981).

This Court set down guidelines for deciding suits under Title VII in *McDonnell Douglas, supra*. First, the plaintiff has the burden of proving by a preponderance of the evidence that there is a *prima facie* case of discrimination. Second, if the plaintiff meets this burden, the burden shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the treatment of the employee. The defendant need only raise a genuine issue of fact as to whether it discriminated against the plaintiff. Third, if the defendant carries its burden, the plaintiff has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802-04; *Burdine, supra*, 450 U.S. at 252-253.

In an unanimous decision this Court also determined in *McDonnell Douglas* that the plaintiff must carry the initial burden

under the statute of proving a *prima facie* case of racial discrimination. The Court, in that landmark decision determined that a *prima facie* case could be proved by showing:

> (i) that the plaintiff belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green,* 411 U.S. at 802, 93 S. Ct. at 1824.

In order for Title VII plaintiffs to effectively meet the burden of proving a *prima facie* case, this Court decided:

> The facts necessarily will vary in Title VII cases and the specifications above of the *prima facie* proof required from Respondent is not necessarily applicable in every respect to differing factual situations, 411 U.S. at 802, n. 13, 93 S. Ct. at 1824 n. 13.

Consequently, courts have altered the four part *McDonnell Douglas* test of establishing a *prima facie* case, to conform to situations arising in a discriminatory discharge. Thus, the District Court below applied the standards established in *Flowers v. Crouch-Walker Corp.,* 552 F. 2d 1277, 1282 (7th Cir. 1977). Petitioner had to establish as a discharged employee that (1) he was a member of a racial minority; (2) he was qualified for the job he was performing; (3) he was performing the job in a satisfactory manner; (4) he was discharged; and (5) after the discharge, the employer assigned white employees to perform the same work. *See also, Flaig v. Bendix Corp.,* 488 F. Supp. 336, 338-39 (E.D. Mich. 1980).

The District Court determined that petitioner failed to meet the final element of the *Flowers* test of proving a *prima facie* case, *i.e.*, he was replaced by a worker who was not of his minority status. Petitioner contends that he satisfied this burden when he submitted sworn testimony that he was replaced by a white employee.[2]

Petitioner contends that a strict application of the *Flowers* criteria is not appropriate in a situation similar to the instant case where the record is unclear whether the displaced minority employee was in fact replaced by a white employee, and such strict application violates the cautions imposed by *McDonnell Douglas,* 411 U.S. at 802, n. 13. An aggrieved discharged employee is not always replaced by a white employee and sometimes not replaced at all, but, nevertheless, he may be discriminated against in violation of Title VII. *DeLesstine v. Fort Wayne State Hospital and Training Center,* 682 F. 2d 130 (7th Cir. 1982), *cert. denied,* ___ U.S. ____ (1982). In *DeLesstine,* appellee, a black male was discharged and replaced by another minority (female), causing the appellant to assert that appellee had not proved a *prima facie* case. The court ruled "the fact that appellants have hired a female to replace appellee does not, therefore, preclude appellee from proving a *prima facie* case of discriminatory discharge from employment." The court decided that creating a racially balanced workforce does not immunize an employer from liability for specific acts of discrimination. The *DeLesstine* court determined that the central focus of the inquiry in a Title VII case such as discharge, is whether the employer treats the plaintiff less favorably

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2. This allegation was allegedly rebutted by respondent who also submitted a sworn affidavit from Mr. Marschik that petitioner was replaced by a black employee. Petitioner contends this replacement occurred after he filed a complaint with the District of Columbia Human Rights Commission. When requested by the District Court, respondent was unable to establish evidence as to who replaced petitioner immediately after his dismissal.

than others because of race. *DeLesstine v. Fort Wayne State Hospital and Training Center,* 682 F. 2d 130 (7th Cir. 1982), *citing Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

II.

The decision below is in conflict with rulings of the Court of Appeals for other circuits and decisions of other District Courts.

In light of this Court's cautionary language in *McDonnell Douglas* and *Burdine* against applying rigid standards to prove a *prima facie* case, a great number of courts in discharge cases have recognized this problem and established a three-part model of proving a *prima facie* case which requires the plaintiff to prove that he, (1) belongs to a racial minority; (2) was discharged; and (3) there was a causal connection between his race and the discharge. *Watson v. Magee Women's Hospital,* 472 F. Supp. 325, 330 (W.D. Pa. 1979); *Rivers v. Westinghouse Electric Corp.,* 451 F. Supp. 44 (E.D. Pa. 1978); *Pearson v. Borden Metals Products Co.,* 434 F. Supp. 840 (D.C. Ala. 1977); *Detroit Police Officers Ass'n. v. Young,* 446 F. Supp. 979 (E.D. Mich. 1978); *Hawkins v. Ohio Bell Telephone Co.,* ____ F. Supp. ____, 93 F.R.D. 547 (S.D. Ohio 1982).

In the instant case, petitioner has established that he has met the first two elements, *i.e.,* he belongs to a racial minority and he was discharged. In order to prove a causal connection, petitioner must show that there is a nexus between race and his discharge. A method of establishing such a connection is proving disparate treatment between the petitioner and members of the other class. *Hawkins v. Ohio Bell Telephone Co.,* 93 F.R.D. at 554, 555. Respondent stated that its reason for discharging petitioner was due to unsatisfactory job performance. The record is clear that other employees similarly situated to petitioner, who were white, had worse job performance records than petitioner, but were retained.

Intentional discrimination may also be proven, "indirectly, by showing that the employer's proffered explanation is unworthy of credence," *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 256. *See also, DeLesstine v. Fort Wayne Hospital and Training Center,* 682 F. 2d 130 at 136, where the plaintiff met his burden of proving a pretext by showing that the employer's reasons for dismissal lacked credibility.

In the instant case, petitioner does not dispute that his supervisor, Mr. Marschik, received a note that "all the brakeys are afraid" to work with petitioner as a result of incidents on March 26, 1976, which allegedly resulted in petitioner's termination. However, petitioner proved that on the day in question, he had not worked within two days of the incident described in the note. Consequently, respondent's proffered reason was not the truth and unworthy of credence as *the* reason for petitioner's discharge. The disparate treatment given petitioner and the unworthy assertions used as reasons for dismissal, establish a causal connection, prove a pretext, create an inference of discriminatory conduct, and at the same time prove a *prima facie* case. *See Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978); *Teamsters v. United States,* 431 U.S. 324 (1977); and *DeLesstine v. Fort Wayne State Hospital and Training Center,* 682 F. 2d 130 (7th Cir. 1982).

III.

The petition presents an important question of federal law which should be specifically addressed by this Court.

The Supreme Court established the procedural standards necessary for proving a *prima facie* case in Title VII actions in 1973 when it decided *McDonnell Douglas.* However, these standards did not adequately address a meaningful test for proving a discharge case. Since 1973, numerous courts, in different circuits,

have created their own tests as a substitute for the *McDonnell Douglas* standard, adhering to a caution noted by this Court, suggesting flexibility on a case by case basis. These tests have not been standardized and often conflict with each other, thus leaving indefinite procedures for proving a *prima facie* case in discharge situations.

While it is clear that this Court has established that a Title VII plaintiff has the burden of proving a *prima facie* case, quite often it is impractical, if not impossible for a plaintiff in a discharge case, to prove who replaced him after he left the workforce, as required by the trial court below, yet it is obvious he may be the victim of vicious discrimination, nevertheless.

The trial court was clearly in error when it denied petitioner a *prima facie* case because petitioner failed to show that he was replaced by a white employee. Petitioner has filed several briefs with appropriate authorities, notwithstanding, the trial court failed to adopt the cautions established in *McDonnell Douglas,* requiring flexibility in each situation when proving a *prima facie* case. The Court of Appeals, likewise, failed to recognize the importance of being flexible in proving these type cases, and understand that specific elements of proof can not always apply in every situation. Yet, discrimination may, nevertheless exist.

We think the court in *DeLesstine* contemplates the true trend of the law in developing proof in discharge Title VII cases, and the principles stated there should be adopted by this Court. *DeLesstine* recognized that the court should be more interested in how the employee was treated because of race, as opposed to whether the plaintiff was replaced by another employee not of a protected group. Petitioner contends, as this Court stated in *Burdine, supra,* that the true test of a *prima facie* case, is whether plaintiff has established that he was discharged "under circumstances which give rise to an inference of unlawful

discrimination, "creating an issue of fact on the reasons asserted by employer for plaintiff's dismissal. The trial court below avoided any discussion on the factual issue raised as to the veracity of the reasons asserted for petitioner's discharge, *i.e.*, the basis of the proof necessary to show discriminatory conduct.

Aside from the obvious error and the gross miscarriage of justice here, petitioner has not had an opportunity to accomplish the one objective that he has sought the most, *i.e.*, to get his day in court to prove that he has been discriminated against.

In summary, this Court should continue to develop the proof phase of Title VII law as it contemplated in *McDonnell Douglas,* to establish more definitive standards of proving a *prima facie* case more specifically in situations of discharge.

The conflict between the determination of the District Court and decisions of other courts, without complete guidance from this Court, underscores the need for a definitive determination by this Court of the questions presented in this case.

CONCLUSION

For all the foregoing reasons, petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING REHEARING FILED DECEMBER 14, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1028 September Term, 1982

Civil Action No. 81-00757

Filed Dec. 14, 1982
George A. Fisher
Clerk

Chavis Teal,

Appellant

v.

Morrison-Knudsen Company, Inc.

ARGUED 10-21-82

BEFORE: Wilkey and Wald, Circuit Judges and McGowan, Senior Circuit Judge

On consideration of appellant's motion for leave to file petition for rehearing and amended affidavits, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to file appellant's lodged petition for rehearing, and, it is

Order Denying Rehearing

FURTHER ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: Robert A. Bonner
Chief Deputy Clerk

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED NOVEMBER 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1028 September Term, 1982

Civil Action No. 81-00757

Filed Nov. 2, 1982
George A. Fisher
Clerk

Chavis Teal,

Appellant

v.

Morrison-Knudsen Company, Inc.

Appeal from the United States District Court for the District of Columbia

Before: Wilkey and Wald, Circuit Judges and McGowan, Senior Circuit Judge

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and was briefed by counsel. The issues presented have been accorded full consideration by the Court; they occasion on need for an opinion. *See* Local Rule 13(c). On consideration of the foregoing, it is

Judgment

ORDERED and ADJUDGED by this Court that the judgment of the District Court on appeal herein is affirmed on the basis of the opinion filed by District Judge Flannery.

It is further ORDERED, by the Court, that appellant's counsel shall file in this Court within two weeks from the date of this judgment a response to appellee's counterclaim for attorneys' fees.

It is further ORDERED by the Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

s/ George A. Fisher
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING SUMMARY AFFIRMANCE FILED JUNE 15, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1028 September Term, 1981

Civil Action No. 81-00757

Filed June 15, 1982
George A. Fisher
Clerk

Chavis Teal,

Appellant

v.

Morrison-Knudsen Company, Inc.

BEFORE: MacKinnon, Wilkey and Mikva, Circuit Judges

On consideration of the motion of appellee for summary affirmance and of the opposition thereto, it is

ORDERED by the Court that the motion for summary affirmance is denied.

Per Curiam

A memorandum of Circuit Judge MacKinnon is attached.

Circuit Judge Wilkey would grant the motion for summary affirmance.

Order Denying Summary Affirmance

MacKinnon, Circuit Judge:

This is a slim case at best but the affidavits of two co-workers which attest to Teal's safe, competent operation of his locomotive, and that other engineers were not fired for unsafe operation, create a factual issue on the issue of pretext and the veracity of Morrison-Knudsen's asserted reason for discharging Teal, that preclude summary judgment and hence summary affirmance. The higher degree of hazard that Teal's operations created may well have justified his discharge when others who created a hazard, but less in degree, were retained, but that must be decided at trial. His affidavits may likewise lack credibility, but that determination is also for trial. I would accordingly reverse *sua sponte* for the complainant to show that the reasons given by the employer were no more than a pretext for the alleged discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-5 (1972).

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 23, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-757

FILED DEC. 23, 1981
JAMES F. DAVEY, Clerk

CHAVIS TEAL,

Plaintiff,

v.

MORRISON-KNUDSEN COMPANY, INC.,

Defendant.

This matter came before the court on defendant's motion for summary judgment. Plaintiff's complaint contends that he was the victim of discriminatory employment practices. Defendant maintains that there are no genuine issues of material fact and, as a matter of law, plaintiff has failed to articulate a prima facie Title VII case. For the reasons expressed below, the motion for summary judgment is granted.

I. Facts

The defendant, responsible for the construction of two portions of the District of Columbia subway system, designated as A6A and A9A, hired personnel based on referrals from local

unions in accordance with contracts negotiated by the Washington Area Construction Contractors Council. The plaintiff was referred by his union hall and was hired on December 23, 1975 as a locomotive operator. Plaintiff was placed on the A6A payroll and began work on the portal operation, which is the excavation of the entranceway to the subway system. At various times, plaintiff's supervisor, Edward T. Marschik, apparently shifted plaintiff from his work on the portal operation to work on tne "mole" operation, which is the excavation of subterranean portions of the subway system. Work on the mole operation was technically part of the A9A contract. Thus, when plaintiff performed work on the mole he received a check which indicated hours expended on the A9A contract. On January 28, 1976, Mr. Marschik notified plaintiff that he was laid off because the need for locomotive operators had declined. Plaintiff does not contend this layoff decision was motivated by discriminatory animus.

The need for additional locomotive operators soon expanded again and Mr. Marschik offered plaintiff the opportunity to return to work. Plaintiff accepted this offer and started working again on February 6, 1976. It is unclear whether plaintiff returned to work on the mole or portal operation. Plaintiff contends that following his recall he started working on the mole operation but was transferred in early March, 1976 to work on the portal operation. Further, plaintiff maintains that the duration of employment at the mole operation was eighteen months longer than at the portal operation and plaintiff was replaced by a white male.

Defendant does not dispute the plaintiff's statement that he was shifted from the mole to the portal during the time period in question but characterizes the significance of this transfer much differently. Defendant indicates that Mr. Marschik, as supervisor, generally shifted workers back and forth from the mole to the

portal operation, depending upon relative manpower needs at the two operations. In addition, defendant contends that during the entire period of plaintiff's employment, he was on the A6A payroll which involved work on the portal operation; thus, any time plaintiff was shifted to work on the mole operation was merely an aberration from his 'normal' employment and plaintiff had no reasonable expectation that he would work on the mole operation at any particular time. Finally, the defendant disputes plaintiff's allegation that he was replaced on the mole operation by a white person. Defendant contends that no one specifically "replaced" plaintiff, as various individuals were shifted back and forth between operations depending on manpower needs. Plaintiff was simply shifted away from his position on the mole in March because more manpower was needed at that time at the portal operation and, therefore, it would be impossible to isolate one individual who took over plaintiff's position on the mole. Defendant states that at some time after plaintiff returned to work defendant began to receive complaints from other employees that plaintiff was not responding to orders of brakemen quickly enough to ensure that accidents would not occur. Specifically, defendant maintains and Mr. Marschik confirms in his affidavit, on March 26, 1976, Mr. Marschik received a written complaint from John Freidt, the Swing Shift Equipment Superintendent, stating that Mr. Teal "doesn't watch the signals or pay attention to the brakeys and as a result, all the brakeys are afraid to work with him." Plaintiff denies that any complaints were received about his work and states that he is without "sufficient information and belief" to determine whether a complaint was actually delivered from Mr. Freidt to Mr. Marschik.

On March 26, 1976, Mr. Leo Pelletier, the Assistant Equipment Superintendent, told Mr. Marschik to terminate Mr. Teal. Shortly afterwards, a meeting was held among members of the company's supervisory staff and representatives of plaintiff's

union local to discuss plaintiff's firing. Defendant contends that at this meeting, the company stated Mr. Teal was being fired because of unsafe job performance. The plaintiff does not dispute this but states he denied his job performance had been substandard. Defendant maintains that Mr. Teal was replaced by Fleming Hughes, a black man. Plaintiff suggests that he was the first replaced by a white man and Mr. Hughes was only hired to take his place *after* charges were filed with the D.C. Office of Human Rights on April 26, 1976.

The D.C. Office of Human Rights issued a determination on June 13, 1977 finding that there was probable cause to believe that plaintiff had been discriminated against within the meaning of Title 34 of the District of Columbia Code. Charges were subsequently filed with the EEOC. Because the EEOC failed to issue a decision within 180 days, plaintiff filed the instant action.

The parties agreed on September 28 that discovery in this case was completed.

II. Discussion

Plaintiff articulates two independent discriminatory employment decisions: (1) his transfer from work on the mole operation to work on the portal operation and (2) his termination in March, 1976.

In a Title VII disparate treatment case such as this, there are three stages of judicial analysis. The burden of producing evidence shifts at each stage. The complainant first bears the burden of establishing a prima facie case of discrimination. The employer, in turn, must come forward with some legitimate, nondiscriminatory reason for the treatment accorded the complainant. The burden then shifts back to the plaintiff to prove

by a preponderance of the evidence that the reason advanced by the employer is no more than a pretext for the discrimination asserted. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-805 (1973); *Abraham v. Graphic Arts International Union,* No. 79-1996, Slip op. at 7-8 (D.C. Cir. August 14, 1981).

McDonnell Douglas set out the standards for establishment of a *prima facie* case of discrimination in the hiring context; the plaintiff must show that (1) plaintiff belongs to a minority; (2) that he applied for and was qualified for a job for which applicants were being sought; (3) that despite his qualifications he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons with complainant's qualifications. 411 U.S. at 802. The Court noted that the requisite elements in Title VII suits will necessarily vary according to the type of employment decision being complained of. *Id.* at n.13. Thus, in a case involving discriminatory discharge, courts have generally altered the test to require that plaintiff demonstrate he was satisfying the normal requirements of his work, *see Flowers v. Crouch Walker Corp.,* 552 F.2d 1277, 1282 (7th Cir. 1977). In addition, the courts have permitted the final element of the *prima facie* case to be established by evidence that plaintiff was replaced by a non-minority worker, *Powell v. Syracuse University,* 580 F.2d 1150 (2d Cir.), *cert. denied,* 439 U.S. 984 (1978) or if the plaintiff was not replaced, by proof that non-minority workers with comparable work records were retained while plaintiff was terminated. *Worthy v. United States Steel Corp.,* 616 F.2d 698, 700 (3rd Cir. 1980); *see also Harris v. Group Health Association, Inc.,* Nos. 79-2544 & 79-2553 (D.C. Cir., August 25, 1981).

If plaintiff makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision made. In *Texas Department of*

Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981) the Supreme Court clarified the meaning of the employers burden at this stage. The employer simply carries the burden of producing evidence suggesting a legitimate, nondiscriminatory reason for rejecting the plaintiff. The employer's reason must be stated with "sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." 101 S.Ct. at 1095; *Aikens v. United States Postal Service Board of Governors,* No. 79-1574, slip op. at 5 (D.C. Cir. September 8, 1981) (on remand). The Court explained that "the defendant need not persuade the court that it was actually motivated by the proffered reasons . . . To satisfy this intermediate burden the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." 101 S.Ct. at 1094, 1096; *St. Peter v. Secretary of the Army,* No. 79-2066, slip op. at 9 (D.C. Cir. July 9, 1981).

If the defendant articulates some nondiscriminatory rationale for the particular employment decision at issue, the final burden shifts to the plaintiff to prove that the rationale proffered is a pretext for discrimination. Pretext can be established in a number of ways: (1) direct evidence of racial animus, e.g., statements that the employee is being fired because he is a member of a racial minority or simply revealing racial bias, (2) comparative evidence that white employees with similarly poor work performances or employment records were retained while plaintiff was not. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 283-84 (1976); and (3) statistical evidence showing that the employer had a pattern or practice of discrimination against persons of plaintiff's race. *McDonnell Douglas Corp. v. Green, supra,* at 804-805.

Application of these shifting burdens standards to the instant case reveals that defendant had established its burden of demonstrating that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.

A) Plaintiff's Firing

Plaintiff has offered evidence that could establish three elements of the *prima facie* case of discriminatory discharge. Plaintiff is a member of a minority group and he was fired. Further, plaintiff has submitted information suggesting that he was satisfying the normal requirements of his work when he was fired. Specifically, plaintiff has submitted the affidavits of two co-workers, Clarence Bates and William Brown, who state that the plaintiff operated his locomotive competently and without excessive risk to fellow employees.

However, plaintiff has not proffered any evidence that could enable a fact finder to conclude that the final element of the *prima facie* case has been established, i.e., that plaintiff was replaced by a worker not of his minority status. Mr. Marschik's sworn affidavit states that the plaintiff was replaced by Mr. Fleming Hughes, who is black. Plaintiff asserts that Mr. Hughes only stepped into plaintiff's old position following the institution of charges with the D.C. Office of Human Rights. However, plaintiff does not present a scintilla of evidence supporting this assertion, nor does he make any effort to demonstrate that a white person, in fact, occupied his vacated position prior to Mr. Hughes' appointment. Thus, defendant has successfully demonstrated that there is no genuine factual issue concerning one component of the *prima facie* case each Title VII litigant must establish. Plaintiff has adduced *no* facts which suggest that plaintiff was, at any time, replaced by a non-minority worker.

Even assuming plaintiff could make out a *prima facie* case of discriminatory discharge, it is evident that defendant could satisfy its burden on the second stage of the Title VII inquiry. Defendant has presented evidence indicating that plaintiff was discharged because he was performing his job in an unsafe manner. In particular, the Marschik affidavit states that numerous complaints concerning plaintiff's failure to pay attention to the brakemen were received after plaintiff's recall. Further, it is undenied that Mr. Marschik received a note from John Freidt to the effect that "all the brakeys are afraid" to work with Mr. Teal; a copy of the note is attached to defendant's motion. Accordingly, the evidence offered by defendant certainly articulates a legitimate, non-discriminatory rationale for plaintiff's discharge.

Because defendant can satisfy its burden of production at the second stage, plaintiff must ultimately prove, by a preponderance of the evidence, that defendant's stated rationale for plaintiff's discharge was a pretext for discrimination. Plaintiff has articulated no *facts* which tend to demonstrate that defendant's proffered rationale for firing the plaintiff was camouflage for illegal discrimination. No direct evidence of racial animus has been brought to the court's attention. Further, the plaintiff has not isolated any comparative data which suggests that the safety standard offered by the defendant was applied selectively to blacks. It is true that the affidavits of Mr. Bates and Mr. Brown state that other locomotive operators actually caused accidents and were not terminated from employment. Of crucial significance, however, the affidavits do not state that the workers retained following accidents were white. The mere fact that certain employees operating their vehicles in an unsafe manner were retained while plaintiff was fired may suggest that plaintiff's discharge was somewhat arbitrary, but it in no way implies that

defendant's decision was *racially* motivated. *See Harris v. Group Health Insurance Inc., supra,* slip op. at 7.

Finally, there are no general employment statistics which imply that the articulated basis for plaintiff's discharge was a pretext for discrimination. The plaintiff refers to certain statistics emphasized by the District of Columbia Office of Human Rights indicating that during March and February of 1976, 12.5% of the sixteen operating engineers hired were black and 22.7% of the 22 engineers fired were black. The Office of Human Rights concluded that this data implied racial animus because the rate of fire for blacks almost doubled the rate of hire during the time period under scrutiny.

The court concludes that the statistics relied upon by plaintiff and the Office of Human Rights are not material as to whether plaintiff's firing was discriminatorily motivated. In numerical terms, the statistics mean that during February and March two out of sixteen persons hired were black and five out of twenty-two fired were black. It is clear that such data is "too fragmentary and speculative to support a serious charge in a judicial proceeding." *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 621 (1974). Given the limited size of the sample involved, percentage comparisons of persons hired and fired is essentially meaningless. *Id.* Only just recently, the Circuit Court for this jurisdiction, relying on *Philadelphia v. Educational Equality League, supra,* rejected a simple comparison of rates of hire and fire as being probative on the issue of racial motivation. *Harris v. Group Health Association, Inc., supra,* slip op. at 6. In *Harris,* the rate of fire for blacks was almost three times as great as the rate of hire for blacks over a three-year period. The court concluded, however, that the entire pool of discharged persons was so small, 14 persons, that comparative rates of hire

and fire was not relevant to the issue of racial motivation. *Id.*, slip op. at 7 & n.8.

The instant case involves comparative rates of hire and fire that are, if anything, less meaningful than those at issue in *Harris;* this case involves a fire rate less than two times greater than the hire rate, in contrast with a fire rate three times greater than the hire rate. Moreover, the employee pools involved in this case are also quite small, sixteen persons hired and twenty-two persons discharged. Most importantly, the statistics relied upon by plaintiff relate to an extremely narrow time period, only two months, compared with the two-*year* time period involved in *Harris.* If comparative employment statistics covering an extended period of time are not probative on the issue of racial motivation, it is evident that the comparative data currently at issue "lack real meaning in the context of this case." *Mayor of Philadelphia v. Educational Equality League, supra,* at 621.[1]

Thus, the statistical data relied upon by plaintiff does not imply that defendant's stated explanation for plaintiff's discharge was actually a pretext for discrimination. There is, therefore, no genuine issue of fact concerning plaintiff's ability to establish that racial animus motivated his firing. Because, as a matter of law, plaintiff is required to prove that defendant's articulated rationale for terminating plaintiff was pretextual, the defendant is entitled to summary judgment with respect to plaintiff's claim of discriminatory discharge.

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1. Significantly, when a more extended time period is viewed, the available employment statistics dispel any conceivable inference of discrimination. During the first half of 1976, according to defendant's uncontroverted evidence, the ratio of blacks employed as locomotive operators actually increased.

B) Plaintiff's Transfer

Plaintiff has adduced evidence with respect to three of the elements that must be established for a *prima facie* case of discriminatory transfer. Plaintiff is a member of a minority and he was transferred to work on the portal, which arguably had an earlier completion date than the mole. At the time of his transfer he was apparently performing satisfactorily on the mole. However, plaintiff has offered no evidence to suggest that he was replaced on the mole by a non-minority individual or that non-minority workers with comparable work records were retained to work on the mole while plaintiff was transferred. Defendant has furnished evidence, by way of Mr. Marschik's affidavit, that an identifiable individual did not take the place of plaintiff and that people were shifted between the two work assignments based solely on relative manpower needs; in other words, white workers were shifted between the two assignments along with Mr. Teal. Because plaintiff proffers no evidence suggesting that he was replaced by a white person on the mole or that whites were not transferred along with him to the portal, summary judgment is in order; there is no material factual dispute *over one* important element in the *prima facie* case that must be proven by plaintiff. Mere conclusory allegations *after* complete discovery has taken place cannot withstand particularized affidavits offered by the defendant. *See, e.g., Vaughn v. Teledyne, Inc.*, 628 F.2d 1214 (9th Cir. 1980); Fed. R. Civ. P. 56(e).

Assuming arguendo plaintiff could make out a *prima facie* case, this would not mean the summary judgment motion should be denied. Defendant has offered a legitimate, non-discriminatory rationale for plaintiff's transfer to the portal. Locomotive operators were transferred regularly between the mole and the portal based upon varying manpower requirements. Plaintiff was

transferred to the portal in March, 1976 because work was necessary on that operation at the time.

At a minimum, the defendant's evidence suggests it randomly shifted workers about and plaintiff's transfer to the portal was simply part of this random assignment process. It is undisputed that plaintiff had been shifted between the mole and the portal before his recall and may have been transferred back to the mole had he not been fired. Even if the specific transfer in question *was* an *arbitrary* work assignment, defendant has articulated a legitimate, non-discriminatory basis for plaintiff's transfer within the meaning of *Burdine;* the absence of any consistent policy regarding transfers between the mole and the portal suggests that employment decisions were not motivated by discriminatory animus. *St. Peters v. Secretary of the Army, supra,* at 9.

Since the defendant has articulated a legitimate, non-discriminatory basis for plaintiff's transfer to the portal, plaintiff has the burden of adducing evidence suggesting that this rationale was actually a pretext for discrimination. Plaintiff has offered not a shred of evidence in this regard. Plaintiff has certainly not pointed to any direct evidence of racial animus, such as racial slurs or racially motivated harassment. As suggested above, plaintiff does not proffer any comparative data suggesting that blacks were generally transferred to the portal at a faster rate than whites, which might indicate that transfers were not, in fact, randomly made. Finally, there is no statistical proof offered revealing a pattern of discrimination by the defendant or Mr. Marschik, the supervisor immediately responsible for plaintiff's transfer. *See Harris v. Group Health Association, supra* at 9.

Thus, there is no genuine issue of fact as to whether plaintiff can demonstrate that defendant's stated rationale for its transfer of plaintiff was a pretext. As a matter of law, plaintiff's failure

to offer any evidence relative to this third stage of the required Title VII analysis compels judgment for the defendant.[2]

Conclusion

There is no genuine issue of material fact as to whether plaintiff can establish a *prima facie* case of discrimination or prove that defendant's stated justification for its employment decisions actually masked illegal discrimination. As a matter of law, defendant is entitled to judgment on both claims asserted by the plaintiff. Thus, the defendant's motion for summary judgment is granted.

An appropriate Judgment accompanies this Memorandum Opinion.

s/ Thomas Flannery
UNITED STATES
DISTRICT JUDGE

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2. It is worth noting that even if plaintiff's claim of discriminatory transfer could survive the summary judgment stage, such a result would be of little solace to plaintiff. Since the court has determined that plaintiff's discharge claim cannot withstand summary judgment, it is difficult to perceive what damages plaintiff could claim even if he were ultimately successful on his discriminatory transfer allegation. It is undisputed that plaintiff's salary was identical on the portal and the mole operations.